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Supreme Court, U.S.
FILED

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NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1996

FEDERICO GARZA,
Petitioner

-against-

CHARLES WEEKLEY, As Mayor of the City of San Benito, Texas
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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45 pgs

QUESTIONS PRESENTED

1. Is the harm caused by the misapplication of Rule 11 of the Federal Rules of Civil Procedures of such an egregious nature that the Supreme Court of the United States should address this denial of procedural due process and decide whether it should modify, clarify, and vacate all previous case law which has not dealt with the novel portion of Rule 11, the safe-harbor provision? This error is so fundamental that continued misuse of this rule will undermine all concepts of justice and fair play.

2. Did the Appellate court err in accepting a brief from a Party who had not yet made an appearance nor has there been an answer filed on his behalf in the case at bar in the lower court?

3. Did the Appellate court err in not addressing all the points of error brought in Petitioner's brief and said points were ignored by Respondent in his brief? Petitioner contends that a magistrate does not have authority to impose "death penalty sanctions on a prevailing party to two motions to remove and who has taken advantage of the "safe harbor" provision of Rule 11, F.R.C.P., and who has not been properly notified of the alleged wrongful conduct as required by Rule 11.

4. Did the Appellate court err in allowing Respondent to supplement the record by Respondent himself filing a document for the record without having the court clerk from the lower court certify the supplement to the record and in overruling Petitioner's objections?

PARTIES TO THE PROCEEDINGS

I hereby certify the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal:

Interested Parties:

1. Charles Weekley, Individually and as Mayor of the City of San Benito, Appellee/Respondent
2. The City of San Benito, County of Cameron, State of Texas, Appellee/Respondent
3. Jan Cassidy, Prior attorney for Appellee
4. Federico V. Garza, Plaintiff, Petitioner
5. The Presiding Magistrate, the Honorable William Black
6. The Presiding Judge, the Honorable Filemon Vela
7. Mark Sossi, Attorney for Appellee/Respondent

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No.

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-against-

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on April 15, 1996.

OPINIONS BELOW

The decision of the district court is entered on June 13, 1995. The decision of the court of appeals is entered on April 15, 1996.

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on April 15, 1996. This court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C.A 1254(1). The order appealed contains a provision requiring compliance and paying a certain sum of money within fifteen (15) days or face a possible contempt action for not having paid.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law...

28 U.S.C.A. SECTION 1447

> (C) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.
> An order remanding the case may require payment of just costs and any actual expenses including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Rule 11 Federal Rules of Civil Procedure

> ...A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdi vision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.
>
> ...(3)Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanctions imposed.

STATEMENT OF THE CASE

This is an appeal from a magistrate's order pursuant to Rule 11 sanctions against a party in that the magistrate did not follow the mandates of said Rule. The motion was granted.

An underlying problem is that a Defendant party was named in a different capacity and the federal court ruled on the merits of the case against that individual without the individual having filed an answer.

However, the Petitioner, who was the one to prevail in the remand motion, was ordered to pay the Respondent who had made the attempt to remove to the federal court from a state

court. The sanction was for the sum of four thousand two hundred and ninety-eight dollars and five cents $4298.05), (TR Vol 1 p 023).

This is a matter which is focused on the question of whether statutorily this case could be removed to the federal court. The underlying state case is one arising from a right given to an individual who has been wrongfully terminated from an appointed post within the state government. The Petitioner herein, requested reinstatement as part of his relief. The case had been set for trial, (TR Vol 2 p 422) however, the Respondents gave their notice for removal. Magistrate Black remanded the case to state court for unspecified reasons,(TR Vol 1 p 022 l 11). Petitioner's contention is that the federal court lacks subject matter jurisdiction in that the federal court does not have the authority to order reinstatement as prayed for in the original petitions and primarily because the Respondents had waived any rights for removal upon not removing within the required thirty days.

The Petitioner never consented to have a Magistrate hear his case. He voiced his objections however, he was never given any hearings although he requested them and made several motions on his behalf. Ironically, the Magistrate granted his motion to remand yet charged him with attorney fees [contrary to statute 28 U.S.C.A. 1447(c)] without giving Petitioner opportunity of even seeing the affidavit of Appellee. Petitioner was successful against Respondent's motion to remove. The Magistrate refused to hear any of Petitioner's objections (TR.Vol 3.p. 7 l 10-14) to Respondent's procedural actions. The Magistrate further did not consider all of the other motions filed by Petitioner. He took Respondent's word that there were only two motions pending (TR. Vol 3 .p 5 l 3-5). The Magistrate admitted he knew nothing of the merits of this case.(TR Vol 3 p 12 l 1-3). See Alizadeh v.

Safeway Stores, Inc., 910 F.2d 234, 236 (5th Cir. 1990), citing Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d. Cir.1986).

Petitioner brought his actions initially in the appropriate state court requesting damages, injunction and reinstatement to his previously appointed post as Commissioner on a Board for the Housing Authority of San Benito, Texas. In a prior pleading, he had mentioned that the conduct taken by Respondents also constituted violation of his rights, however, he was not bringing his cause of action on those points of law. Respondents removed, however, the federal court correctly remanded.

In a subsequent pleading, even after two unsuccessful motions for summary judgment against him, Petitioner sued Respondent, Charles Weekley, the Mayor, in his individual capacity,(TR Vol 1 p 113). At that time he brought in as part of his cause of action 42 U.S.C.A., Section 1983 action against the mayor as an individual. Petitioner informed Respondent, through a pleading that he had a federally protected right violated which gave rise to a cause of action. He informed Respondents on or about the 8th of April 1994, by filing and serving upon Respondents a Bill of Exceptions, (TR Vol 1 p 171) as to all the causes of action that the state judge was ignoring from his case. Petitioner's intent was clear that he was to pursue a federal cause of action against the Respondent, Charles Weekley, individually.

Respondents did not remove until on or about the 10th of August, 1994. This is approximately four (4) months after their notice. Other than this notice of removal and replies to various motions presented by Petitioner, the Respondents only filed a motion for sanctions,(which action seems to have made Charles Weekley a party as an individual), (TR Vol 1 p 94), and a motion for a more definite statement,(TR Vol 2 p 226).

Respondents further filed a motion to strike Plaintiff's responsive pleading since Plaintiff's attorney was not admitted to the Federal Bar, (TR Vol 1 p 135).

One of Petitioner's complications occurred when the case was removed to the federal court, Petitioner's attorney was disqualified to act for Petitioner in that said attorney was not licensed to practice in front of the federal bench, (TR Vol 1 p 138). First and foremost, Petitioner requested, in a certified letter, (TR Vol 1 p 141), to the trial court if he had to retype all of the pleadings sent to them or if he could simply ratify by letter all that his attorney had filed. To this request, nothing was ever answered.

The other documents filed by Petitioner in the federal court were the following:

(1) Defendant Mayor Weekley was served as an individual (within the Statute of Limitations) on or about the 3rd of October 1994,(TR Vol 1 p 048).

(2) Motion to Remand,(TR Vol 2 p 198).

(3) Motion to Serve Charles Weekley individually (TR Vol 1 p 089)

(4) Plaintiff's Response to Motions for Sanctions for Fraudulent Remand,(TR Vol 1 p 151).

(5) Plaintiff's Response on Defendant's Motion for a More Definite Statement,(TR Vol 1 p 142).

(6) Plaintiff's Letter ratifying all of his

attorney's actions and pleadings filed in federal court,(TR Vol 1 p 141).

(7) Plaintiff's Motion for Leave to Amend Plaintiff's Motion to Remand, Amend Plaintiff's Pleadings and Reply to Defendant's Motion for Sanctions for Fraudulent Remand,(TR Vol 1 p 062).

(8) Plaintiff's Motion for Leave to Allow Plaintiff in Lieu of Hearing to Serve Interrogatories on Defendant's Motions for Sanctions, (TR Vol 1 p 040).

(9) Plaintiff's Motion for Continuance, (TR Vol 1 p 032).

(10) Plaintiff's Motion to Vacate or Modify Order on Defendant's Motion for Sanctions for Fraudulent Remand, and/or in the Alternative, that a Hearing be Held to rule on Special Appearance,(TR Vol 1 p 012).

(11) Motion for Hearing on All Filed Documents and Reply to Defendants Motion to Strike Plaintiff's Responsive Pleadings since Plaintiff's Attorney Not Admitted to Federal Bar, (TR Vol 1 p 089).

(12) Request by Appellant for Transmission of Records,(TR Vol 1 p 002).

(13) Addendum to Letter Ratifying Attorney's Actions, (TR Vol 1 p 139).

(14) Notice of Appeal, (TR Vol 1 p 011).

(15) Amended Notice of Appeal, (TR Vol 1 p 007).

Except for Plaintiff's Motion to Remand and Defendant's Motion for Sanctions, none of the other motions were addressed by the magistrate. The magistrate did not take any evidence on the motions and made his decision in violation of Rule 11 (c)(3).

The magistrate ordered sanctions against Petitioner, and remanded the case to the state court. The court also struck all federal claims against parties who had not yet answered, although served. Petitioner, by his third and fourth amended petition, sought redress in a forum from a particular Respondent, although this particular Respondent had not yet answered in his individual capacity. The federal court struck all Petitioner's alleged causes of action from Petitioner's petition.

The last motion then brought by Petitioner was his Motion to Vacate or Modify Order on Defendant's Motion for Sanctions for Fraudulent Remand, and or in the Alternative, that a hearing be held to rule on special appearance. Although the federal system does not have a "special appearance" procedure per se, Petitioner was complaining that he did not want a magistrate to have anything to do with his case. He desired a federal judge who had been duly appointed by the President of the United States. Therefore, Petitioner labeled this motion as a Special Appearance.

Magistrate Black failed to have a hearing on this motion and therefore this motion that opposed the magistrate was never addressed by Magistrate Black nor did the Federal Judge allow or grant a hearing. Charles Weekley who had been Respondent as the Mayor of the City of San Benito, was also sued as an individual in the state court just prior to the

removal action. Individually, Charles Weekley never answered, even though it seems he appeared in the second removal action through his attorney, and also failed to consent in writing to the second removal action as required by the Federal Rules of Civil Procedure. Consequently, the notice for removal was defective due to the lack of parties involved and the waiver of the 30 day requirement for removal.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT THE EXTENT TO WHICH A MAGISTRATE MAY APPLY RULE 11 SANCTIONS IRRRESPECTIVE OF THE FOLLOWING:(1) RESPONDENT FAILED TO CEASE PURSUIT OF SANCTIONS AND AVOID THEIR EXPENSES AND FEES; (2) THE RESPONDENT FAILED TO STATE ANY GROUNDS AS REQUIRED BY RULE 11; (3) THE RESPONDENT VIOLATED THE SAFE HARBOR PROVISIONS OF RULE 11; AND (4) THE FINAL ORDERS DID NOT DESCRIBE THE CONDUCT DETERMINED TO CONSTITUTE A VIOLATION OF THE RULE NOR EXPLAINED THE BASIS FOR THE SANCTIONS IMPOSED ALL CONTRARY TO RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Petitioner had filed in the state court a third amended petition in which he included the original party of Charles Weekley, as the mayor of the City of San Benito. In addition, Petitioner filed also against Charles Weekley as an individual. This was filed on the 4th of August, 1994,(TR Vol 1 p113). The causes of action against the Respondent Charles Weekley, individually, were based on the Civil Rights Act, 42 U.S.C.A. 1983 et seq.

Respondent, Charles Weekley, as mayor, removed the case to the federal courts on or about the 10th day of August, 1994,(TR Vol 2 p 230). Respondent Charles Weekley, individually, had not yet been served. He was served with all the documentation as it stood in the federal court on the 3rd day

of October, 1994, (TR Vol 1 p 048). Respondent, Charles Weekley, individually, has failed to answer the Fourth Amended Petition and failed to consent to removal action. However, Charles Weekley,individually, seemingly appeared through his attorney's representation in seeking sanctions, (an affirmative action), in his individual capacity in the affidavit to court filed on August 9, 1994.(TR Vol 1 p 130 l 15-16).

Petitioner immediately upon being notified of a possible Rule 11 violation, repled and asked the magistrate to allow him to replead. However, Respondents ignored Petitioner's actions. Rule 11(c)(1)(A)states a Motion for Sanctions "shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged ...claim...is not withdrawn." (See Appendix D, which is a true and correct copy of the Letter attached to Motion for Sanctions, and is hereby incorporated by reference as if fully copied herein.)

The Record on Appeal does not reflect that Petitioner was afforded this customary 21 day 'window of opportunity' to withdraw his claim. Since the record reflects an absence of Respondents' compliance with the requirements of initiating a Rule 11 sanctions motion, therefore the sanctions must fail. This motion was raised solely by the Respondent, this was not a sua sponte action.

On (TR Vol 1 p 009) District Judge Vela finds that "Plaintiff expressly waived those (federal) causes of action in his Motion to Remand filed August 22,1994... ".

Assuming arguendo, that the 'window of opportunity' commenced on August 4, 1994,(Plaintiff's Third Amended Petition), Petitioner withdrew his federal claims within 21 days of having asserted them. Thus even prior to Rule 11 requirements coming into force, Petitioner had already sought to litigate only in State court.

The final order of the federal magistrate, the same being one of the ones complained of herein, states "Ordered that Defendant Charles Weekley's motion for sanction be granted, that all federal causes of action brought pursuant to 42 U.S.C.A. section 1983 and 1985 are stricken and denied by this court and that to the extent that there are any remaining causes of action, that those must proceed according to the laws and procedures of the courts of the State of Texas,(TR. Vol.1 .p 022-023.).

Petitioner made his motion to vacate this order, (TR Vol 1 p 012). However, the federal court then restated its objectives in the following manner:

> "Should the Plaintiff wish to further disobey that authority, he does so under peril of a contempt from this court.(TR. Vol.1 .p 010 15-6).

Petitioner is being denied the right to go to court for redress of a wrong. He was performing his duties as a commissioner when he was removed without good cause. The excuse Respondents used for termination were groundless, without merit, in truth, in fact or in law, and was done only to prevent Petitioner in stopping the improprieties within the PHA and being ratified by city government. Now, the Petitioner is bringing his causes of action in a most distinct way and zeroing in on those individuals responsible. The federal courts, without the real Respondent having answered, have dismissed Petitioner's petition.

If indeed there are facts to show a cause of action, the Petitioner is guaranteed a forum. The Supreme Court of the United States has stated that:

> where an actual controversy with Federal jurisdiction exists over the legal relations of adverse parties, discretion usually cannot properly be exercised by refusing an adjudication; though unusual circumstances, such as other pending suits or supersession of state authority sometimes justify refusal of relief.

(Eccles v. Peoples Bank, 333 U.S. 426, 92 L.ed 784.) The Constitution of the United States of America guarantees protection to the individual by giving a right to a jury trial. The Seventh Amendment states that " the right of trial by jury shall be preserved..." and the statutes in which Petitioner was bringing his causes of actions allow a trial by jury.

Petitioner concedes that if his case would have been in a stage of where he must produce evidence and he as Plaintiff could not do so, then the court may have dismissed his complaint. As the court cogently stated in Langwa v Gorton-Penn Vessels Co., 59 F2d, 315, (1932, C A. 1. Mass.), nonsuit or dismissal for insufficiency of evidence can be granted in federal courts without Plaintiff's consent.

However, Petitioner had sued a party who had not filed his answers yet. However, the court took it upon itself to decide on the matter irrespective of the fact that the court stated " I am not judging the merits of your claims against the City of San Benito. I don't know anything about them and will never know anything about them", (TR. vol.3 p 12 l 1-3). See Alizadeh v. Safeway Stores, Inc., 910 F.2d 234, 236 (5th Cir. 1990), citing Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d. Cir.1986). And the court dismissed all causes of action against that party Respondent, even after admitting its ignorance.

Rule 11 should not countenance sanctions for pleadings filed in state court in a case later removed to federal court unless, their deficiency, having been promptly brought to the attention of the pleader after removal, the pleader refuses to conform to Rule 11. Rule 11 does not apply to conduct that occurred in a state court before removal.(Foval v. First Nat. Bank of Commerce in New Orleans, 841 F.2d 126, 130(5th Cir. 1988).

II.

THE COURT OF APPEALS ERRED IN UPHOLDING THE MAGISTRATE'S GRANTING OF SANCTIONS AGAINST PETITIONER ON A REMOVAL ACTION IN VIOLATION OF 28 U.S.C.A. SECTION 1447 (c) NOTWITHSTANDING THAT PETITIONER WAS THE ONE WHO WAS GRANTED HIS MOTION TO REMAND, HE WAS ORDERED TO PAY RESPONDENT'S ATTORNEY FEES.

Petitioner filed his third amended petition on or about the 8th day of August 1994. In it, he amended to add a present party in another capacity, (TR. vol.1 p 113). Appellee, Charles F. Weekley, individually, failed to answer in his individual capacity and therefore, he never consented to the removal action. Petitioner filed his motion to remand based on various points to included that the federal court lacked original jurisdiction and that the relief he was seeking was not available from the federal bench. Therefore, the federal court should not take jurisdiction.

However, Petitioner conceded that if the Respondent, Mayor Charles Weekley, indeed desired to stay in the federal court, he could invoke 28 U.S.C.A. 1442 as a deemed federal officer and then there would be no issue taken from Petitioner, (motion to remand,last page),(TR. vol. 2 p 202 16-13). The true and ultimate choice belonged to Respondent,Charles Weekley. By reason of his being the mayor of a city who is in charge of appointing and removing, (for good cause) PHA board members whose principal funds come from a federal agency administering funds which automatically confers federal officer status as defined by federal law. As a federal officer, all he had to do was invoke 28 U.S.C.A. Section 1442, and the case gets heard in federal court.

Petitioner added civil rights violations against Respondent, Charles Weekley individually and not Respondent Mayor Charles Weekley. However, Respondent requested attorney fees as sanctions,(TR.vol. 1 p 022) and the court granted the attorney fees to be paid in fifteen (15) days and also granted Petitioner's motion to remand.

Petitioner invokes 28 U.S.C.A. Section 1447(c) which states the following:

> ...An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal...The State Court may thereupon proceed with such case.

As in all laws, the meaning of the words must be read as to how they are defined. The attorney fee's go against who removed improperly. The Supreme Court of The United States stated in United States v. South-Eastern Underwriters Association, 64 Sup. CT. L.ed. 1162 88 L.ed. 1440, that ordinarily courts do not construe words used so as to give them a meaning more narrow one which they had in common parlance. There seems to be a question of which law should be afforded more deference, a statute (28 U.S.C.A.1447) or Rule 11.

In the case at bar, the statute invoked makes use of the words "as a result of the removal". Obviously, someone initially chose a forum. Obviously, it was a state court which was chosen. Then there was a mistake. The mistake was to have taken the case to the federal court. Had it not been an error to have removed to federal court, then the case would still be in the federal court system.

There is obviously cost involved in all of this labor expended. The statute allows costs to include attorney fees. Various courts have awarded attorney fees. The following are but examples of such an action by the court:

1. Plaintiff who successfully obtained remand of improperly removed case was entitled to recover reasonably attorney fees incurred by remand motion. 28 U.S.C.A. Section 1447(c)-Mattice v. ITT Hartford Ins Group, 837 F. Supp. 499.

2. Award of cost and attorney's fees incurred in remanding case to state court following removal was not appropriate, where removing parties acted in apparent good faith on colorable claim of removal 28 U.S.C.A. Section 1447(c)- Griffin v. Holmes, 843 F.Supp. 81.

3. Cost and attorney fees for successfully arguing motion to remand case to state court were not recoverable absent showing of bad faith on part of defendant in removing case beyond 30-day time limit. 28 U.S.C.A. Section 1446(b), 1447(c)-Marler v. Amoco Oil Co., Inc. 793 F.Supp. 656.

4. Plaintiffs were entitled to reasonable attorney fees and expenses incurred as a result of defendants' improper removal of case. 28 U.S.C.A. Section 1447(c) -S.M. v Jones, 794 F.Supp.638.

However, at no time have attorney fees been appropriate for the recovering parties unless there has been fraud. There has been no fraud on the part of the Petitioner. He has a

cause of action and wished to be redressed, therefore, he sued the individual who caused the problem. The suit was later amended to bring one of the party Respondents in a different capacity than the one originally sued. That individual is deemed a federal officer which means that if he indeed wanted to stay in the federal court, he would only have to invoke his rights. However, he decided against it.

The statute, 1447(c) states specifically that fees may be charged for having removed the case. It further states that the remanding order may require payment of just costs. There is no logical explanation for sanctions of a party who was correct in the first place. The Petitioner was in the state court. He had nothing to do with removal. If he had been incorrect, the federal court should have left the case in federal court and not punish him with sanctions.

The courts have held that the actions of which district courts have original jurisdiction are not subject to remand irrespective of whether the Plaintiff intended to allege a federal claim or a state claim, if a federal cause of action exists, (See Leonardis v. Local 282 Pension Trust Fund, 391, F Supp. 554, D.C. N.Y. 1975).

The courts have also held that once a case is properly removed, Plaintiff can not successfully do anything to defeat federal jurisdiction and force a remand, (Lewis v. Charles H. Bentz & Associates, Inc., 601 F. Supp. 109, D.C. Wis. 1985).

Furthermore, actions of which district courts have original jurisdiction as in the instant case are not subject to remand irrespective of whether the Plaintiff intended to allege a federal or state claim, if a federal cause of action exits, (Leonardis v. Local 282 Pension Trust Fund, 391, F.Supp. 554, D.C. N.Y.1975).

If these courts are correct, then anything the Petitioner did is totally and completely without any legal effect and if

the court remanded it was because the case had to be remanded. Therefore, Petitioner should not be penalized with sanctions. To substantiate this, the general rule is that in considering Plaintiff's motion to remand action, removed from state to federal court, the nature of Plaintiff's claim must be evaluated in basis of the record as it stands at the time petition for removal is filed. (Bruan, Gordon, & Co. v. Hellners, 502 F. Supp. 897,D.C. N.Y., 1980.)

The only logical explanation is that the case should have never been removed to the federal court from the beginning. Therefore, the trial court erred in granting sanctions against Petitioner.

Wherefore, Petitioner requests that this court nullify the trial court's order in the part of the final orders which mandates payment of sanctions in the form of attorney fees.

III.

THE COURT OF APPEALS ERRED IN UPHOLDING THE MAGISTRATE'S GRANTING SANCTIONS AGAINST PETITIONER IN THAT RESPONDENT'S NOTICE OF REMOVAL WAS DEFECTIVE SINCE NOT ALL PARTIES HAD ANSWERED IN THEIR RESPECTIVE CAPACITIES THEREFORE AS A MATTER OF LAW, THE CASE WOULD HAVE HAD TO HAVE BEEN REMANDED DUE TO LACK OF CONSENT OF ALL PARTIES AS REQUIRED BY THE RULES AND FURTHERMORE SAID PARTY, CHARLES WEEKLEY, INDIVIDUALLY, WAS ALLOWED TO FILE A BRIEF FOR APPEAL, THEREFORE APPELLATE COURT ERRED IN ACCEPTING A BRIEF FROM A PARTY WHO HAD NOT YET MADE AN APPEARANCE NOR HAS AN ANSWER BEEN FILED IN THE CASE AT BAR IN THE LOWER COURT.

Petitioner filed his third amended original petition in the state court on or about the 8th of August, 1994. (TR Vol 1 p113). He brought in the Respondent in another capacity. The Mayor of the City of San Benito was sued individually. An answer as an individual was never filed. However, he seemingly made his appearance through his attorney when his attorney sought affirmative relief in his Affidavit for Removal dated August 9, 1994,(TR. Vol 1 p 130). The Respondent, Mayor Charles Weekley, filed a notice to remove,(TR Vol 2 p 230). On or about the 3rd day of October, the new Respondent was served with all documents filed in the federal court,(TR Vol 1 p 048).

Petitioner relies on several cases which stand for the proposition that if all Defendants did not consent to the removal, the court can not grant the petition for removal. On the case at bar, a party had been named but in a different capacity on or about August 4, 1994,(Third Amended Petition),(TR Vol 1 p 113). However, before service of process was perfected, Respondent's filed a removal action on or about August 10, 1994, (TR Vol 2 p 230).

That means that the removing party had notice that a new party Respondent had been brought in a different capacity, (See Removal Affidavit prepared by Respondent's Attorney dated August 9, 1994, TR Vol 1 p 130). And although, said new Respondent had not answered, the attorney for said Respondent seemingly made his appearance in Affidavit dated August 9, 1994. (See Motion to Remand, Affidavit, TR Vol 1 p 130 l 15-16). Respondent's attorney sought affirmative relief in the document thereby effecting his appearance. Respondent,however, failed to consent in his individual capacity for the removal action.

In a case with more than one Respondent, consent of all Defendants is necessary... (Thomas v. Shelton, 740 F. 2D 478, C.A. Ind. 1984.) Other courts have gone further and stated the following:

> Failure of all Defendants to consent to removal precluded federal district courts from granting petition for removal. (Adams v. Aero Services Intern, Inc.,657 F.Supp. 519, E.D. Va. 1987)

Therefore, the trial court erred in accepting the removal as a correct one. The court had no choice but to remand.

The cover of Respondent's brief, the title page, the certificate of interested parties, the statement regarding oral argu-

ment, the statement of jurisdiction, and the prayer submitted to the Court of Appeals is prima facie evidence that Respondent has failed to identify if the attorney is writing the brief representing Charles Weekly as Mayor of the City of San Benito, The City of San Benito, and or Charles Weekly, individually.

Petitioner requests that the order granting the sanctions be nullified and a new order issued limiting it to remanding the case to the state court.

IV.

THE COURT OF APPEALS ERRED IN ALLOWING A MAGISTRATE TO RULE ON PETITIONER'S MOTIONS, OVER PETITIONER'S OBJECTIONS, THE MAGISTRATE RULED ON THE MERITS OF A CAUSE OF ACTION WHEN THE PROPER RESPONDENT HAD NOT ANSWERED. THE COURT FAILED TO CONSIDER THAT DEFENDANT NOW RESPONDENT, CHARLES WEEKLEY, WAS BEING SUED IN A DIFFERENT CAPACITY AND HAD NOT FILED AN ANSWER.

Petitioner timely made his objections to the magistrate ruling on his motions. The magistrate ruled on the causes of actions stated by Petitioner. Furthermore, the Petitioner complained about how Respondent Charles Weekley, individually, had not yet answered.

Petitioner further invokes 28 U.S.C.A. Section 636(b) which states as follows:

> a judge may designate a magistrate to hear and determine any pre-trial matter pending before the court, except.... for judgment on the pleadings...

Petitioner further invokes 28 U.S.C.A. Section 636(c)(1) which states as follows:

> Upon the consent of the parties, ...

Petitioner not only never consented to a magistrate, he objected being placed with a magistrate. Never was any document signed and in such cases, the standard consent form for referral of case to a magistrate signed by a pro se Plaintiff in a

section 1983 action, constitutes valid, unambiguous, clean and explicit consent, (Lovelace v. Dallas, 820 F. 2d 223, C.A. of Ill, 1987.) Many courts have held that in absence of consent of parties to appeal of a decision of a magistrate on record to judge of district, the district court had no jurisdiction over appeal in a section 1983 action, and appropriate appeal route was to the Court of Appeals as a matter of right. (Freeman v. Petsock, 820 F.2d 628 CA. 3, Pa 1987.).

Petitioner never agreed to the magistrate and therefore the magistrate had no right to rule on his motions, dismiss his causes of action against a Respondent who had not yet answered, and order Petitioner sanctions when in truth and in fact, Petitioner was the one who was successful in obtaining a remand.

Petitioner requests that this court nullify the district court's order and renders for Petitioner, upholding the remand and denying the rest of the order. Petitioner contends that Magistrate Black should have concluded the same as did Magistrate Garza on April 16, 1993, which states "Removal was improper.", (TR Vol 1 p 165 l 1).

CONCLUSION

Petitioner has been sanctioned unjustly and contrary to the mandates of the statutes of the United States. He was not afforded a hearing in which to present his evidence for a proper determination of his motions as required by the Federal Rules of Civil Procedure. Furthermore, he was in front of a magistrate when he specifically objected to such a tribunal.

The magistrate did not allow Petitioner to urge all of his motions and proceeded to rule against Petitioner based on misrepresentation to the court by Respondent. The court

ordered a dismissal of causes of actions without a formal hearing. Moreover, the court improperly ordered sanctions for having ruled favorably in Petitioner's motion. This is contradictory at law as it is in an equitable sense and in violation of 28 U.S.C.A. 1447(c).

Therefore, the only way to rectify this result is that this Supreme Court issue a Writ of Certiorari and subsequently reverses and renders remanding the case to state court .

Prayer

Petitioner prays that this Court, through a Writ of Certiorari, rescinds the order of the district court and that of the magistrate in the granting sanctions and renders an order remanding this case to the state court and further orders the parties to return to the state court to follow the procedural steps required by due process.

Petitioner also prays that the cost be taxed to Respondent and that Petitioner receives any other relief, at law or in equity, which he may be entitled to receive.

Respectfully Submitted,

Federico Garza, Pro Se
519 W. Harrison Street
Harlingen, Texas 78550
Telephone (210)428-6945
Fax(210)428-6990

CERTIFICATE OF SERVICE

I, Federico V. Garza, hereby certify that on the 15th day of July, 1996, a true and correct copy of the above and foregoing was delivered to opposing counsel by certified delivery, U.S. Postal Service, return receipt requested, to -wit: the Petition for Writ of Certiorari.

Mr. Mark Sossi
WILLETE & AGUILAR
3505 Boca Chica Boulevard
Brownsville, Texas 78521

Mr. Charles Weekley
1300 Crescent Drive
San Benito, Texas 78586

_____

Federico V. Garza

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40552

(Argued: None Decided: April 15, 1996)

(Summary Calendar)

FEDERICO GARZA,

Plaintiff-Appellant,

versus

CHARLES WEEKLEY, As Mayor
of the City of San Benito, Texas

Defendant Appellee.

Appeal from the United States District Court
for the Southern District of Texas,
(B-94-CV-232)

Before JOLLY, JONES, and STEWART, Circuit Judges.

PER CURIAM:*

Appellant Federico Garza appeals the lower court's granting of sanctions pursuant ot Fed. R. Civ. P. 11 against him. Finding no abuse of discretion, we AFFIRM.

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set fort in Local Rule 47.5.4.

FACTS

Garza was a commissioner of the Public Housing Authority (PHA) of the City of San Benito in Cameron County, Texas. Weekley, mayor of San Benito dismissed Garza, who filed suit against Weekley in state court, alleging wrongful termination in violation of due process. When Weekley removed the cause to federal court, the district court remanded the case to state court based on Garza's assertion that the due process claim was based solely on state law.

One week before the case was set for trial in state court, Garza filed his third amended petition wherein he alleged that the due process right upon which he was suing was based on the U.S. Constitution. Weekley again removed the case to federal court, moved for sanctions against Garza on grounds that he had fraudulently induced the first remand. Weekley requested an order striking Garza's federal claims and a monetary award for reasonable attorney fees.

After a hearing conducted by a magistrate judge, and pursuant to Garza's objections, the lower court reviewed *de novo* the magistrate judge's proposed orders. The court affirmed the magistrate judge's sanction award of $4,298.05, the amount delineated by Sossi, Weekley's counsel, in his affidavit as the portion of the fees spent on only the removal and remand aspects of the case. The court affirmed the magistrate judge's other orders that the case be remanded, and that Garza's federal causes of action "be forever stricken." Furthermore, the court held that if Garza failed to comply with the sanction order, "he does so under peril of a contempt order from this court."

Garza has appealed only the sanction order, contending that the sanction award was improper because he only received a copy of the affidavit, and that he had been denied an opportunity to present oral or written arguments against Weekley's claim for sanctions.

DISCUSSION

Mayor Weekley contends that the sanction order is unappealable it "is not a final order." This court and the district court retain jurisdiction over the Rule 11 aspect of a case, even if the removal of the case to federal court was improper. *Wily v. Coastal Corp.*, 855 F.2d 1160, 1172 (5th Cir. 1988), *aff'd*, 503, 855 U.S. 131, 112 S. Ct. 1076, 117

L. Ed. 2 d 280 (1992). Accordingly, this court has jurisdiction of Garza's appeal.

The propriety of a district court's Rule 11 sanctions are reviewed for abuse of discretion. *Willy*, 855 F.2d at 117; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405. 110 S. Ct. 2447, 110 L. Ed. 2d 358 (1990). However, :[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of evidence." *Cooter & Gell*, 496 U.S. at 405.

The district court did not abuse its discretion by sanctioning Garza because the federal claims he alleged in his third amended petition were found to be groundless and contrary to his specific prior denials. Garza's factual averment that he did not receive a copy of Sossi's affidavit is contradicted by the lawyer's certificate of service. While the district court's opinion did not advert to whether Garza received the copy or had any opportunity to contest it, Garza knew several months before the magistrate judge's determination of quantum that the affidavit was going to be filed, and the magistrate judge had specifically stated that either side could request another hearing on quantum. In lieu of requesting another hearing, Garza filed a motion for leave to serve interrogatories relative to the motion for sanctions, and for a continuance pursuant to the same motion. In view of Garza's failure to request an additional hearing, it was not an abuse of discretion for the magistrate to proceed with determination of the quantum of sanction. "Deference to the determination of courts on the font lines of litigation will enhance these court's ability to control the litigants before them." *Cooter & Gell*, 496 U.S. at 404.

If the district court makes a "substantial award" of attorney fees as a sanction, it must determine that the award "satisfie(s) the requirement that the fees must have been reasonably incurred as a result of a violation of Rule 11 and in light of the duty to mitigate." *Willy*, 855 F.2d at 1173. The claimant must "submit...sufficiently detailed information from which the district court (can) determine what portion of (the) fees and expenses were incurred because of Rule 11 violations." *Id.* Mr. Sossi's affidavit complies with this requirement, both as to the determination that the fees were incurred as result of the violation, and as to the amount of those fees. Thus, the district court did not abuse its discretion by imposing the monetary sanction. AFFIRMED.

APPENDIX B

(Filed June 13, 1995)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FEDERICO GARZA	§	
	§	
VS.	§	CIVIL ACTION NO. B-94-232
	§	
CHARLES F. WEEKLEY, as Mayor of the City of San Benito	§	

ORDER

Before the Court is Plaintiff Federico Garza's Motion to Vacate the part of the Magistrate Judge's Order dated April 24, 1995, granting Defendant's Motion for Sanctions for Fraudulent Remand.

Pursuant to 28 U.S.C§ 636 (b) (1) (A), this Court may reconsider any pretrial matter ruled upon by the magistrate where it has been shown that the magistrate's order is clearly erroneous or contrary to law. However, after a de novo review of the entire file, the Court finds that the magistrate Judge's Order awarding sanction to the Defendant in the amount of $4,928.05 is neither clearly erroneous nor contrary to law.

Though the Court recognizes the authority of the Magistrate Judge to order the remand of a cause of action without further review by the district court, the Court nevertheless--in an abundance of caution--independently orders that this case be remanded to the state court. The Court also adopts the portion of the Magistrate Judge's Order striking all Plaintiff's federal causes of brought pursuant to 42 U.S.C. § 1983 and§ 1985, and so orders that those causes of action be forever stricken. Plaintiff expressly waived those causes of action in his Motion to Remand filed August 22, 1994, wherein he stated: "This [suit] is governed under the statutes of the State of Texas and

therefore, federal court lacks subject matter jurisdiction." Should Plaintiff ever re-urge a federal claim in this suit thereby causing this cause of action to return to this Court, the Defendants will be subject to immediate dispositive relief.

Moreover, contrary to Plaintiff's assertions in Paragraph 13 of his Motion, the Magistrate Judge indeed is empowered to order the issued monetary sanction against the Plaintiff, and the Plaintiff is bound to heed that Order. Should the Plaintiff wish to further disobey that authority, he does so under peril of a contempt order from this Court.

THEREFORE, it is **ORDERED** that the Plaintiff's Motion to Vacate the Magistrate Judge's Order is **DENIED**, and this cause of action is **REMANDED** to the 103rd Judicial District Court of Cameron County, Texas.

Done this 13th day of June, 1995, in Brownsville, Texas.

/s/ Filemon B. Vela
United States District Judge

APPENDIX C

(Filed April 24, 1995)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FEDERICO GARZA	§	CIVIL ACTION NO: B-94-232
	§	
vs	§	
	§	
CHARLES F. WEEKLEY, as	§	
Mayor of the City of San Benito	§	

ORDER

On this day came on for consideration, Defendant Charles Weekley's Motion for Sanctions, and Plaintiff's Motion to Remand. The Parties appeared and through any counsel of record after hearing oral argument, this Court finds that Defendant Charles Weekley's Motion for Sanctions is GRANTED and that Federico Garza's Motion to Remand is granted in part and denied in part. It is therefore,

ORDERED that Defendant Charles Weekley's Motion for Sanctions be GRANTED, that all Federal causes of action brought pursuant to 42 U.S.C. §1983 and 1985 are stricken and denied by this Court and that to the extent there are any remaining causes of action, that those must proceed according to the laws and procedures of the Courts of the State of Texas.

It is further ORDERED that this action be remanded to 103rd Judicial District Court and that a certified copy of this order be mailed to the 103rd Judicial District Court upon receipt of which that court my proceed with the action according to the laws and procedures of the Courts of the State of Texas.

It is further ORDERED that the Federal claims made by Plaintiff Federico Garza in this Fourth Amended Petition are goundless and are contrary to the specific prior denials by Plaintiff that such a cause

of action exists. Plaintiff Federico Garza is ordered to pay the sum of $4,298.05 as attorney fees and expenses to Charles Weekley as Mayor of the City of San Benito within fifteen days of entry of this order.

SIGNED on this 24th date of April, 1995 at Brownsville, Tex.

/s/ JUDGE WILLIAM BLACK
U.S. MAGISTRATE JUDGE PRESIDING

APPENDIX D

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August 15, 1994

Charles Willette, Jr.
J. Arnold Aguilar

ANNABELL ALEGRIA
LORI K. ERWIN
CARLOS E. HERNANDEZ, JR.
LISA M. MOUNT

MIGUEL SALINAS
MARK SOSSI
HUGH P. TOUCHY
EDDIE TREVINO, JR.

Of Counsel:
PATRICK RUSSELL

Mr. Juan Angel Guerra
Attorney at Law
305 W. Hidalgo
Raymondville, Texas 78580

RE: Cause No: 92-08-3201-D
Federico Garza, Andres Gonzales, and Johnny Gonzales v. Charles F. Weekley, as Mayor of the City of San Benito
Our File No. : 92-216 MA/AA

Dear Mr. Guerra:

Two years ago, your client represented to the United States District Court that he was not alleging a cause of action under 42 U.S.C. §1983 for violations of his Fourteenth Amendment rights. Based on these representations, this case was remanded back to State District Court.

Now, one week before trail in State Court, you amended your petition alleging a cause of action under 42 U.S.C. §1983 for violation of your clients due process rights; clearly the same Federal claim your client denied existed in 1991.

We have discussed how your client's misrepresentations to the United States District Judge resulted in my client incurring $13,110.00 in attorney fees and unnecessarily delayed the outcome of this litigation.

Please find enclosed a complete copy of my Motion for Sanctions which is being served on you pursuant to Rule 11, F.R.C.P. I will file the Motion in 21 days. Please take advantage of the 'safe harbor provisions" set forth in Rule 11 F.R.C.P. (b) (1) (a).

Sincerely,

WILLETTE & AGUILAR

By: /s/ Mark Sossi
Mark Sossi

MS: ie
Enclosures (Motion for Sanctions)
CM/RRR P 862-375-687
xc: Mr. Butch Barbosa
United States District Clerk
United States Courthouse
500 E. 11th St.
Brownsville, Texas 78520